Jayonik Sdn Bhd v Agriquip Machinery Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-66–11 OF 2021
AZLAN SULAIMAN JC
7 NOVEMBER 2023

Tort — Breach of confidence/confidential information — Conspiracy to injure — Whether plaintiff had failed to plead material particulars in respect of aforesaid torts — Whether plaintiff had also failed to adduce cogent evidence to prove that defendants had committed those torts

The second and third defendants ('D2' and 'D3') were formerly employed by the plaintiff as, respectively, a mechanical engineer and a graphic software engineer. They had, inter alia, signed an 'Employee Non-Disclosure Agreement' ('NDA') which forbade them from disclosing to, or using for the benefit of, third parties any confidential or proprietary information and trade secrets of the plaintiff which they were exposed to or had acquired during their employment with the plaintiff. If they breached that covenant, D2 and D3 agreed to pay the plaintiff liquidated damages. While in the plaintiff's employ, D2 and D3 had worked on the development of a state-of-the-art equipment called Airside GSE Simulator ('the simulator'). The plaintiff had then appointed D1 as the exclusive distributor of the simulator. To assist D1 in its marketing efforts, the plaintiff had delivered a demonstration set ('demo set') of the simulator to D1. About two years after the plaintiff signed the exclusive distributor agreement with D1, D2 and D3 resigned from the plaintiff to join D1's employ. In the instant action, the plaintiff claimed that the defendants had breached the distributor agreement, committed the tort of breach of confidence/confidentiality in the disclosure of the plaintiff's trade secrets and confidential information to D1 and that they had conspired to injure the plaintiff. The plaintiff's pleadings largely dwelled on D1's alleged wrong-doings alleging that D1 had, inter alia, advertised and marketed the simulator as its own invention and product, allowed third parties to use the demo set for their training purposes without obtaining the plaintiff's consent, induced the plaintiff's employees including D2 and D3 to leave the plaintiff's employ to join D1, retained possession of the demo set despite the distributor agreement having been terminated by the plaintiff and had acted in breach of the plaintiff's intellectual property rights in the simulator and thereby caused the plaintiff to suffer loss and damage. The plaintiff entered into a consent judgment with D1 and the trial of the action proceeded only against D2 and D3.

Held, dismissing the plaintiff's claims against D2 and D3:

(1) To establish that D2 and D3 had committed breach of confidence/confidentially in the disclosure of the plaintiff's trade secrets, the plaintiff had to establish that the information was confidential and was communicated in circumstances importing an obligation of confidence and that the unauthorised use of that information had caused it detriment. In other words, the plaintiff needed to (but failed to) plead and prove particulars of the private and confidential information of the hardware and software of the simulator which D2 and D3 were alleged to have received in confidence and which they then passed on or communicated to D1. The particulars pleaded by the plaintiff were insufficient and fell way short of what the law required of the plaintiff to plead (see paras 13, 20 & 25).

(2) According to the NDA, the plaintiff's technical information consisted of 15 items or categories, namely, electronic diagrams, mechanical drawings, computer programs, source codes, source files, 3D models, methods, processes, formulae, compositions, systems, techniques, inventions, machines and research projects. The plaintiff ought to have pleaded to which of those 15 matters the alleged confidential information acquired by D2 and D3 in circumstances importing an obligation of confidence and which they had allegedly disclosed to D1 related (see para 26).

(3) The need for the plaintiff to have specifically pleaded details of the private and confidential information of the hardware and software of the simulator which D2 and D3 had alleged communicated to D1 was all the more crucial given that D2 and D3 each possessed different qualifications and capabilities, were engaged by the plaintiff in different roles and capacities and were different cogs in the wheel of the plaintiff's operations. The private and confidential information that was communicated to each of them would have been different and at different times. They each brought their own qualifications, background and experience to their roles to the extent that it was unfair to characterise them as one and the same (see para 27).

(4) By not pleading the relevant particulars as aforesaid, the plaintiff was in effect asking the Court to assume that just because it was alleged that the equipment which D1 marketed and produced so closely resembled the simulator, that it must have been D2 and D3 who must have communicated the plaintiff's confidential information to D1. It had to be noted that it was the plaintiff itself that had provided D1 with the demo set. This meant D2 and D3 were not the sole link between the plaintiff and D1 vis a vis the simulator (see paras 28–29).

(5) The particulars pleaded by the plaintiff were also insufficient in law to support a cause of action for conspiracy to injure. There was a total failure to plead the existence of any agreement between the defendants to injure

the plaintiff and a failure to plead the specific acts they had allegedly done to execute such an agreement. Having had access to the plaintiff's confidential information, joining D1, being seen entering D1's premises and being photographed operating the demo set were all actions which, even taken collectively, do not a conspiracy to injure make. The plaintiff was again expecting the court to assume from those facts that there was a conspiracy between the defendants to injure the plaintiff (see paras 37–38).

(6) It was D1 which was the cause of the plaintiff's woes and grievances. And the plaintiff was sore that D2 and D3 had joined D1 after the disdain with which D1 had dealt with the plaintiff. The plaintiff had reached a bargain with D1 vide the consent judgment, but that bargain did not weigh in or make D2 and D3 liable for any of the plaintiff's claims against them. On its pleaded case and on the evidence, the plaintiff had failed to prove any of its claims in the instant action against D2 and D3 (see paras 39 & 41).

[Bahasa Malaysia summary

Defendan kedua dan ketiga ('D2' dan 'D3') sebelum ini bekerja dengan plaintif, sebagai jurutera mekanikal dan jurutera perisian grafik. Mereka telah menandatangani 'Perjanjian Tanpa Pendedahan' ('PTP') yang melarang mereka daripada mendedahkan, atau menggunakan untuk faedah pihak ketiga sebarang maklumat sulit atau hak milik dan rahsia perdagangan plaintif yang didedahkan oleh mereka atau telah diperoleh semasa bekerja dengan plaintif. Sekiranya mereka melanggar perjanjian itu, D2 dan D3 bersetuju untuk membayar ganti rugi jumlah tertentu kepada plaintif. Semasa dalam pekerjaan plaintif, D2 dan D3 telah mengusahakan pembangunan perisian Airside GSE Simulator ('simulator'). Plaintif kemudian melantik D1 sebagai pengedar eksklusif simulator tersebut. Bagi membantu D1 dalam usaha pemasarannya, plaintif telah menyampaikan set demonstrasi ('set demo') simulator kepada D1. Kira-kira dua tahun selepas plaintif menandatangani perjanjian pengedar eksklusif dengan D1, D2 dan D3 meletak jawatan daripada plaintif untuk menyertai D1. Dalam tindakan ini, plaintif menghujahkan bahawa defendan telah melanggar perjanjian pengedar, melakukan tort pelanggaran kepercayaan/kerahsiaan dengan mendedahkan rahsia perdagangan dan maklumat sulit plaintif kepada D1 dan mereka telah berkomplot untuk merugikan plaintif. Rayuan plaintif sebahagian besarnya berhubung dakwaan salah laku D1 yang menyatakan bahawa D1 telah, antara lain, mengiklankan dan memasarkan simulator sebagai ciptaan dan produknya sendiri, membenarkan pihak ketiga menggunakan set demo untuk tujuan latihan mereka tanpa mendapatkan persetujuan plaintif, mendorong pekerja plaintif termasuk D2 dan D3 untuk meninggalkan pekerjaan dengan plaintif untuk menyertai D1, mengekalkan pemilikan set demo walaupun perjanjian pengedar telah ditamatkan oleh plaintif dan telah bertindak melanggar hak

harta intelek plaintif dalam simulator dan dengan itu menyebabkan plaintif mengalami kerugian dan kerosakan. Plaintif membuat penghakiman persetujuan dengan D1 dan perbicaraan tindakan itu hanya diteruskan terhadap D2 dan D3.

Diputuskan, menolak tuntutan-tuntutan plaintif terhadap D2 dan D3:

(1) Untuk membuktikan bahawa D2 dan D3 telah melakukan pelanggaran kepercayaan/kerahsiaan dengan mendedahkan rahsia perdagangan plaintif, plaintif perlu membuktikan bahawa maklumat itu adalah sulit dan telah dikomunikasikan dalam keadaan yang memerlukan keyakinan itu diberikan dan penggunaan maklumat tersebut adalah tanpa kebenaran dan menyebabkannya kerugian. Dalam kata lain, plaintif perlu (tetapi gagal dalam kes ini) memplidkan dan membuktikan butiran maklumat peribadi dan sulit mengenai perisian simulator yang D2 dan D3 dikatakan telah diberi kepercayaan yang kemudiannya dikomunikasikan kepada D1. Butiran yang dituntut oleh plaintif tidak mencukupi dan plaintif tidak memenuhi keperluan undang-undang di dalam pliding (lihat perenggan 13, 20 & 25).

(2) Menurut PTP, maklumat teknikal plaintif terdiri daripada 15 perkara atau kategori, iaitu gambar rajah elektronik, lukisan mekanikal, program komputer, kod sumber, fail sumber, model 3D, kaedah, proses, formula, komposisi, sistem, teknik, ciptaan, mesin dan projek penyelidikan. Plaintif sepatutnya memplidkan bahawa bahawa antara 15 perkara itu, maklumat sulit yang didakwa diperoleh oleh D2 dan D3 berada dalam keadaan yang mewajibkan kepercayaan dan D1 telah didedahkan maklumat tersebut (lihat perenggan 26).

(3) Keperluan untuk plaintif memplidkan secara khusus butiran maklumat peribadi dan sulit perisian simulator yang didakwa D2 dan D3 dikomunikasikan kepada D1 adalah lebih penting memandangkan D2 dan D3 masing-masing mempunyai kelayakan dan keupayaan yang berbeza, dilantik oleh plaintif untuk kerja dan kapasiti yang berbeza dan merupakan sebahagian dari operasi plaintif. Maklumat peribadi dan sulit yang dikomunikasikan sesama mereka berbeza pada masa yang berlainan. Mereka masing-masing membawa kelayakan, latar belakang dan pengalaman mereka sendiri menurut peranan mereka dan tidak adil untuk menganggap mereka sebagai sama (lihat perenggan 27).

(4) Dengan tidak memplidkan butiran yang berkaitan seperti yang dinyatakan di atas, plaintif sebenarnya memohon kepada mahkamah untuk menganggap bahawa hanya kerana perisian itu dipasarkan oleh D1 dan menyerupai simulator, D2 dan D3 dianggap mengkomunikasikan maklumat sulit plaintif kepada D1. Perlu diingatkan bahawa plaintif sendiri yang telah memberikan set demo kepada D1. Ini bermakna D2 dan D3 bukanlah satu-satunya hubungan

antara plaintif dan D1 mengenai simulator (lihat perenggan 28–29).

(5) Butiran yang dituntut oleh plaintif juga tidak mencukupi menurut undang-undang untuk menyokong kausa tindakan konspirasi untuk merugikan. Terdapat kegagalan sepenuhnya untuk memplidkan kewujudan sebarang perjanjian antara defendan untuk merugikan plaintif dan memplidkan tindakan tertentu ketika membuat perjanjian sedemikian. Setelah mendapat akses kepada maklumat sulit plaintif, menyertai D1, dilihat memasuki premis D1 dan dirakam mengendalikan set demo adalah semua tindakan yang walaupun dilihat secara kolektif, bukanlah satu konspirasi untuk merugikan. Plaintif sekali lagi mengharapkan mahkamah membuat anggapan dari fakta-fakta tersebut bahawa terdapat konspirasi antara defendan untuk merugikan plaintif (lihat perenggan 37–38).

(6) D1 adalah punca masalah plaintif. Plaintif juga sakit hati kerana D2 dan D3 telah menyertai D1 selepas D1 tidak baik dengan plaintif. Plaintif dan D1 telah menyelesaikan perkara itu melalui penghakiman persetujuan, namun ianya tidak menjadikan D2 dan D3 bertanggungjawab terhadap mana-mana tuntutan plaintif terhadap mereka. Berdasarkan keterangannya, plaintif gagal membuktikan sebarang tuntutannya di dalam tindakan ini terhadap D2 dan D3 (lihat perenggan 39 & 41).]

Cases referred to

BT Engineering Sdn Bhd v Team United Resources Sdn Bhd & Anor [2012] 5 MLJ 720, HC (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, Ch D (refd)

Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor [2016] 3 MLJ 417, FC (refd)

Faccenda Chicken v Fowler [1985] FSR 105, Ch D (refd)

Ganesh Raja a/l Nagaiah & Ors v NR Rubber Industries Sdn Bhd [2017] 2 MLJ 396, CA (refd)

Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors [2017] MLJU 1187, HC (refd)

Ng Kim Fong v Menang Corporation (M) Sdn Bhd [2020] MLJU 644, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

Seager v Copydex Ltd [1967] 2 All ER 415, CA (refd)

Hazeeq Fadzli bin Hasrul Sani (Akram Hizri Azad & Azmir) for the plaintiff. Akmal Marizaiee (Akmal Marizalee & Co) for the defendants.

Azlan Sulaiman JC:

INTRODUCTION

[1] Even though this action was filed against three defendants, the full trial only proceeded against the second and third defendants, the plaintiff's former employees, as on 27 June 2022 the plaintiff and the first defendant recorded a consent judgment between them ('the consent judgment').

[2] The plaintiffs' causes of action against the second and third defendants are two, namely breach of confidence/confidentiality in the disclosure of the plaintiff's trade secrets and confidential information to the first defendant and, together with the first defendant, conspiracy to injure the plaintiff.

[3] Deciding the plaintiff's claims against the second and third defendant will first necessitate an examination and analysis of the salient background facts and the consent judgment.

SALIENT BACKGROUND FACTS AND THE CONSENT JUDGMENT

[4] Since its formation in 2002, the plaintiff has been involved in the research, development and commercialisation of simulation and virtual reality products. One of its products is an 'Airport Driving simulator and Crew Training for Airport Ground Handing' ('Airside GSE Simulator') that it developed between October 2017 and December 2018.

[5] The Airside GSE Simulator is used to simulate the operation of ground vehicles at airports, such as baggage tractors, conveyor belt loaders and joint cargo pallet loaders, to train airport personnel on the use of these vehicles, safely indoors protected from inclement weather incorporated into its apparatus is a 360 degree-view mock cockpit that allows the operator to view all angles and directions of the surroundings, and a plug and play function that allows the operator to switch from one such vehicle to another at ease. Utilised on the Airside GSE Simulator is a 3D model the plaintiff referred to as 'KLIA 3D Model', for use, obviously, at the KLIA Airport.

[6] In or around July 2018 to March 2019, the plaintiff carried out discussions and negotiations with POS Aviation Sdn Bhd ('POS Aviation') and AeroDarat Services Sdn Bhd ('AeroDarat') to sell and supply the Airside GSE Simulator to each of them.

[7] At around the same time, the plaintiff was contacted by and conducted discussions and negotiations with the first defendant for the latter to be appointed as its exclusive distributor of the plaintiff's products, including the

Airside GSE Simulator. Those discussions and negotiations culminated in the execution between them of an exclusive distributor agreement dated 11 March 2019 ('exclusive distributor agreement'). The exclusive distributor agreement, inter alia, prohibited the first defendant from dealing or negotiating with either POS Aviation or AeroDarat since the plaintiff was already in discussions with both of them.

[8] On the first defendant's request, the plaintiff supplied the first defendant with a demonstration set of the Airside GSE Simulator ('the demonstration set') that was purely meant to assist the first defendant in marketing the Airside GSE Simulator and the plaintiff's other products.

[9] The plaintiff's claim against the first defendant was based on several allegations, which can be summarised as follows:

(a) the first defendant, without the plaintiff's consent, had dealt directly with POS Aviation and AeroDarat in breach of the exclusive distributor agreement;

(b) the first defendant had allowed POS Aviation to use the demonstration set to train its employees without the plaintiff's consent;

(c) the first defendant had marketed and promoted the Airside GSE Simulator and the demonstration set as if they were its own inventions and products;

(d) the first defendant had breached the exclusive distributor agreement in failing to make some of the payments to the plaintiff prescribed thereunder;

(e) the first defendant had breached the exclusive distributor agreement in trading with third parties to supply products similar to the plaintiff, including the Airside GSE Simulator;

(f) the first defendant had breached the exclusive distributor agreement in approaching, contacting and inducing the second and third defendant to leave the plaintiff's employ and work with it;

(g) all of the first defendant's actions were breaches of the plaintiff's intellectual property rights in the Airside GSE Simulator and thus adversely affected the plaintiff's trade and caused it loss and damage; and

(h) despite the termination of the exclusive distributor agreement, the first defendant retained possession of the demonstration set and continued to use it to market its own products that were identical or similar to the plaintiff's products, including the Airside GSE Simulator.

[10] The plaintiff's claim against the first defendant was for breach of the exclusive distributor agreement, infringement of the plaintiffs intellectual property rights, and conspiracy to injure the plaintiff.

[11] On 27 June 2022, the plaintiff and the first defendant recorded the consent judgment. It was not translated into English. The terms of the 'Penghakiman Persetujuan' are:

> *TANPA SEBARANG PENGAKUAN TERHADAP APA-APA LIABILITI OLEH MANA-MANA PIHAK, DI HAKIM KAN SECARA PENGHAKIMAN PERSETUJUAN,* seperti berikut:
>
> (1) Defendan Pertama mengaku janji bahawa ia (samada secara sendirinya atau melalui syarikat-syarikat sekutu, pengarah-pengarah, pegawai-pegawai, pengkhidmat-pengkhidmat dan/atau ejen-ejen mereka) tidak akan mendekati, mengganggu, menghubungi, mendorong, menawarkan pekerjaan dan/atau melakukan apa-apa perbuatan positif terhadap mana-mana pengarah-pengarah, pegawai-pegawai, pengkhidmat-pengkhidmat dan/atau ejen-ejen Plaintif bagi bagi tujuan mengambil pekerja Plaintif dan/atau melanggar hak harta intelek, rahsia dagangan/pemiagaan dan maklumat sulit Plaintif;
>
> (2) Plaintif dibenarkan untuk memasuki premis Defendan Pertama untuk mengambil kembali perkakasan dan perisian set demonstrasi Airside GSE Simulator (terhad kepada perisian simulasi dan/atau alam maya yang digunakan bagi set tersebut, papan elektronik dan kerangka bagi sistem pandangan 360 darjah ('360 degrees view') dan apa-apa peralatan dan perisian lain yang akan dibeli semula oleh Plaintif daripada Defendan Pertama) di dalam keadaan seperti mana ada (as is basis) tertakluk kepada pembayaran semula oleh Plaintif kepada Defendan Pertama pads harga yang akan dirunding atau ditetapkan melalui taksiran Mahkamah yang Mulia ini (setelah ditolak depresiasi perkakas dan perisian) dan setelah peralatan-peralatan tersebut dikembalikan kepada Plaintif, Defendan Pertama mempunyai hak mutlak kepada mana-mana peralatan lain yang tidak tertakluk kepada Perintah Penghakiman Persetujuan ini;
>
> (3) Defendan Pertama mengakujanji bahawa ia akan menghentikan sebarang pembangunan, penggunaan serta pengkomersilan perkakasan dan perisian Airside GSE Simulator yang dibangunkan oleh Plaintif atau apa-apa simulator lain yang menggunakan rekaan, fungsi dan konsep harta intelek, rahsia dagangan/perniagaan dan maklumat sulit Plaintif dan Plaintif mengesahkan bahawa perisian yang dikenali sebagai SIMMAC yang butir-butirnya telah dikemukakan ketika pendengaran permohonan Plaintif melalui Notis Permohonan Plaintif yang bertarikh 15.11.2021 (Lampiran 4) di dalam Guaman No WA-22IP-66–11/2021) adalah bukan perisian yang merupakan hakmilim intelek Plaintif;
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> (4) Defendan Pertama mengakujanji bahawa ia akan menghentikan dan memadamkan semua jenis pemasaran, promosi dan pengiklanan (samada secara menerusi medium atas talian ('online') atau medium bukan atas

talian) yang berada di dalam kawalan Defendan Pertama berkenaan perkakasan dan perisian Airside GSE Simulator atau apa-apa simulator lain yang menggunakan sebarang ciri-ciri, rekaan, fungsi dan konsep harta intelek, rahsia dagangan/perniagaan dan maklumat sulit milik Plaintif;

(5) Defendan Pertama menarik balik dan memulangkan semula kepada Plaintif keseluruhan perkakasan serta perisian bagi set Airside GSE Simulator yang dibekalkan Plaintif untuk dijual oleh Defendan Pertama kepada Azmar Aviation Training Centre, Iraq (pada keadaan seperti mana ada ('as is basis')) dalam tempoh enam (6) bulan dari tarikh Penghakiman Persetujuan ini (dan Defendan Pertama berhak memohon lanjutan masa selama tiga (3) bulan dari tarikh akhir untuk penarikan balik dan pemulangan semula keseluruhan perkakasan serta perisian bagi set Airside GSE Simulator yang dibekalkan Plaintif tersebut);

(6) Merujuk kepada obligasi Defendan Pertama di perenggan 5 Penghakiman Persetujuan ini, ia tertakluk kepada bayaran deposit bagi kos pengangkutan dan pembayaran semula berjumlah RM33,000 dibayar Plaintif kepada Defendan Pertama atau kepada peguamcara Plaintif sebagai pemegang taruhan ('stakeholders') dalam tempoh tujuh (7) hari dari tarikh Penghakiman Persetujuan direkodkan. Baki berjumlah RM77,000 dibayar Plaintif kepada Defendan Pertama atau peguamcara Defendan Pertama sebagai pemegang taruhan ('stakeholders') untuk dilepaskan setelah penerimaan keseluruhan perkakasan serta perisian bagi set Airside GSE Simulator kepada Plaintif dalam tempoh yang ditetapkan;

(7) Tertakluk kepada terma-terma Penghakiman Persetujuan ini, Plaintif menarik balik semua tuntutannya terhadap Defendan Pertama dan Defendan Pertama menarik balik Notis Permohonan bertarikh 31.05.2022 yang difailkan olehnya di dalam (Guaman No WA-221 P-66–11/2021) berkenaan suatu kebenaran untuk memfailkan tuntutan balas terhadap Plaintif, tanpa perintah terhadap kos; dan

(8) Tiada perintah berkenaan kos bagi Penghakiman Persetujuan ini.

THE PLAINTIFF'S CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS FOR BREACH OF BREACH OF CONFIDENCE/CONFIDENTIALITY IN THE DISCLOSURE OF THE PLAINTIFF'S TRADE SECRETS

Some basic principles

[12] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, Megarry J said:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the Saltman case on p 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in

circumstances importing an obligation of confidence'. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

[13] Thus, the three elements for establishing breach of confidence are:

(a) the information is confidential;

(b) the information was communicated in circumstances importing an obligation of confidence; and

(c) unauthorised use of that information to the detriment of the party communicating it.

[14] In *Seager v Copydex Ltd* [1967] 2 All ER 415, Lord Denning MR said:

> The law on this subject does not depend on any implied contract It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it He must not make use of it to the prejudice of him who gave it without obtaining his consent The principle is clear enough when the whole of the information is private.

[15] In *BT Engineering Sdn Bhd v Team United Resources Sdn Bhd & Anor* [2012] 5 MLJ 720, Hanipah Farikullah JC (now JCA) referred to *Faccenda Chicken v Fowler* [1985] FSR 105 that essentially categorised three types of information for considering whether there had been a breach of confidence by an employee or ex-employee:

(a) information which because of its trivial character or easy accessibility from public resources cannot be regarded by reasonable persons or by the law as confidential. The employee is at liberty to disclose it during his service or afterwards as he pleases, even to a competitor;

(b) information which the employee must treat as confidential (either because he is expressly told it is or because from the character it is obviously confidential) but which once learned necessarily remains in the employee's head and becomes part of his own skill and knowledge applied in the course of his employer's business. So long as the employment continues, he cannot otherwise use or disclose such information. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; and

(c) specific trade secrets so confidential that, even though may necessarily have been learned by heart and even though the employee may have left the service, cannot lawfully be used save for the employer's benefit.

[16] The Court of Appeal in *Ng Kim Fong v Menang Corporation (M) Sdn*

Bhd [2020] MLJU 644 referred to and approved of this passage in *BT Engineering* (see para 135 of the judgment of S Nantha Balan JCA).

[17] To those cases on what constitutes breach of confidence/confidentiality can be added the following two on the essentials of what must be pleaded by the plaintiff for such claim. For, it is on what a plaintiff pleads that defendants will know what case they have to rise up to meet and oppose.

[18] In *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417, the plaintiffs alleged breach of confidence by the defendants. The second defendant, being the major director cum shareholder of the first defendant, had set up a rival company, the first defendant, to carry out the same kind of business. The plaintiff alleged that the second defendant had allegedly used the knowledge and confidential information he had obtained during his tenure with the plaintiff to gain an unfair advantage over the plaintiff; that the defendants had used manufacturing techniques developed by the plaintiffs; and the defendants through second defendant had unlawfully kept or possessed the copyright materials of the plaintiffs without the knowledge or authorisation of the plaintiffs; and that the defendants had approached and stolen some of the plaintiffs' clients. In paras to of the judgment, Richard Malanjum CJ (Sabah and Sarawak) said:

> We note that there is nothing in the statement of claim indicating that the plaintiffs confined their claim for breach of confidentiality clauses only on their four product lines. On the contrary the claim is cast in the broadest terms possible including the various purported acts committed by the second defendant allegedly in breach of his covenants with the plaintiffs.
>
> While it is true that the claim of the plaintiffs is only to enforce the contractual clauses related to confidential information entered and agreed upon by the second defendant we do not think it is sufficient in the statement of claim by merely stating that the second defendant had 'misappropriated the private and confidential information of the plaintiffs.
>
> Surely more particulars should have been given on the alleged misappropriated private and confidential information. The second defendant is entitled to know what are the private and confidential information allegedly to have been misappropriated by him. It would then allow him to contest the claim of privacy and confidentiality of those information. After all Information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine (see *Faccenda Chicken Ltd v Fowler* Ch 117 and *Ixora Trading Incorporated and another v Jones and another* (1989) IP & T Digest 11 FSR 251).

[19] In *Ganesh Raja a/l Nagaiah & Ors v NR Rubber Industries Sdn Bhd* [2017] 2 MLJ 396, Hamid Sultan JCA said:

> The rules of pleadings as well as proof play an important part in dealing with cases related to confidential information. The concepts and principles appear to be uniform in common law jurisdictions. It is the requirement that the pleadings must clearly identify the information alleged to have been imparted in confidence and to have been misused by the defendant to secure an equitable remedy such as injunction, accounts, etc. If the pleadings only identify a generic breach of an agreement, then at the most the relief may be damages for breach of contract.

[20] What these two cases mean to this case here is that, if the plaintiff is alleging that the second and third defendants have committed a breach of confidence in respect of its private and confidential information relating to the Airside GSE Equipment, then it needs to plead and prove details of the private and confidential information of the hardware and software of the Airside GSE Equipment that they are alleged to have received in confidence and passed on and communicated to the first defendant.

ANALYSIS AND DECISION

[21] The second and third defendants are indeed former employees of the plaintiff. The second defendant was employed as a mechanical engineer from 20 April 2016 to 9 January 2021, and the third defendant was employed as a graphic software engineer from 15 April 2015 to 29 January 2021. Apart from their letter of employment, each of them also signed an 'Employee Non-Disclosure Agreement' ('NDA'). Save for cl 7 of the NDA, the other terms of the NDA each of them signed were identical. Clause 7 of the second defendant's NDA provided:

> Employee agrees to pay liquidated damages in the amount of (RM1,000,000) for any violation of the covenant not to disclose confidential information contained in this Agreement.

Clause 7 of the third defendant's NDA provided:

> Employee agrees to pay liquidated damages in the amount to be decided by the company for any violation of the covenant not to disclose confidential information contained in this Agreement.

[22] Clause 1 of the NDA expressly provided:

> CONFIDENTIALITY
>
> Employee acknowledges that in the course of Employee's employment by the Company, Jayonik MSC Sdn Bhd (760578-W), Employee will be exposed to valuable confidential and trade secret information of Company. Employee agrees to treat all such information as confidential and to take all necessary precautions against of such information to third parties during and after the term of this Agreement.

A Employee acknowledges that trade secrets of the Company will consist of but will not be necessarily limited to:

(a) Technical information: Electronic diagrams: mechanical drawings, computer programs, source codes, source files, 3D models, methods, processes, formulae, compositions, systems, techniques, inventions, machines, and research projects.

B

(b) Business information: Customer lists, pricing data, sources of supply, financial data and marketing, production, or merchandising systems or plans.

C Employee understands that this Agreement does not and will not prevent him/her from working for any other Company subsequent to the termination of his/her employment as specified in the employment agreement with the Company as long as the Employee does not use or disclose any such confidential and proprietary information of the company.

D

[23] The plaintiffs claim against the second and third defendants is that they had breached the NDA and the plaintiffs confidence in disclosing the plaintiff's trade secrets and confidential information to the first defendant. The plaintiff draws that conclusion on the assumption that, as the first defendant E was able to market and trade in the Airside GSE Simulator both during the subsistence of and after the termination of the exclusive distributor agreement, then surely it was the second and third defendants, who had access to the plaintiffs confidential information while under the plaintiffs employ, who had provided that information and know-how to the first defendant.

F

[24] In para 47 of the *pernyataan tuntutan*, the plaintiff pleaded seven particulars of the second and third defendant's breach of confidence/confidentiality. In particular, in sub-paras 47.2 and 47.3 of the *pernyataan tuntutan*, the plaintiff contended:

G

47.2 Akan tetapi, kedua-dua Defendan Kedua dan Defendan ketiga didapati kerap dilihat keluar dan masuk ke premis Defendan Pertama di Sepang, Selangor Darul Ehsan, sejurus selepas tamat perkhidmatan mereka di syarikat Plaintif, di mana bukti-bukti fotografi/bergambar telah direkodkan Plaintif pada tarikh berasingan secara secara konsisten;

H

47.3 Malah, Defendan Ketiga juga telah diambil gambar beliau sedang mengendalikan set demonstrasi Airside GSE Equipment (yang masih tidak dipulangkan Defendan Pertama kepada Plaintif sehingga ke hari ini) pada 14 Mei 2021.

I

[25] In my view, these particulars are insufficient and fall way short of what the law requires the plaintiff to plead. In this instance, the plaintiff failed to plead the particulars of the private and confidential information of the Airside GSE Simulator which the second and third defendants are alleged to have

received in confidence and then misappropriated and communicated to the first defendant, which would have enabled them to properly and adequately contest the plaintiffs claim.

[26] According to the NDA, the plaintiff's technical information consisted of 15 items or categories, namely electronic diagrams, mechanical drawings, computer programs, source codes, source files, 3D models, methods, processes, formulae, compositions, systems, techniques, inventions, machines, and research projects. Of the 15, the plaintiff ought to have pleaded which of them were the alleged confidential information that had allegedly been imparted to the second and third defendants in circumstances importing an obligation of confidence and which they are alleged to have disclosed to the plaintiff.

[27] I believe the need for the plaintiff to have specifically pleaded details of the private and confidential information of the hardware and software of the Airside GSE Equipment that they are alleged to have passed on and communicated to the first defendant is all the more crucial here given that the second and third defendant each possess different qualifications and capabilities, were engaged by the plaintiff in different roles and capacities, and were different cogs in the wheel of the plaintiffs operations. What private and confidential information that was communicated to each would have been different and at different times. They each brought their own qualifications, background and experience to their roles to the extent that it is unfair to characterise them as one and the same.

[28] By not pleading those particulars of the private and confidential information of the Airside GSE Simulator which the second and third defendants are alleged to have received in confidence and then misappropriated and communicated to the first defendant, the plaintiff is in effect requesting this court to assume that, just because it alleges that the equipment which the first defendant marketed and produced so closely resembled the Airside GSE Simulator that it must have been the second and third defendants, their former employees who must have communicated the plaintiff's private and confidential information to the first defendant. That is a quantum leap that this court is unwilling to take.

[29] The need for the plaintiff to have sufficiently pleaded those particulars is further heightened in this case by the fact that the plaintiff had earlier provided the first defendant with the demonstration set. This means that the second and third defendants were not the sole link between the plaintiff and the first defendant vis a vis the Airside GSE Simulator.

[30] As for being seen at the first defendant's premises and the third defendant being photographed operating the Airside GSE Simulator, the

plaintiff had expressly pleaded that that was after they had both left the plaintiffs employ. As there was no prohibition or legal impediment on them joining the first defendant, there was nothing wrong with that. There was no obligation on them to inform the plaintiff where they were moving onto, even if they had been asked. Since the first defendant was their new employer, entering and leaving the defendant's premises would be natural. Fortunately for the plaintiff, the second and third defendants had not taken issue with the plaintiff's questionable tactic of clandestinely keeping them under surveillance after they had left the plaintiff's employ.

[31] Even if the second and third defendants had been spotted entering or exiting the first defendant's premises whilst still in the plaintiff's employ (which was never alleged), that alone does not obviate or excuse the need for the plaintiff to plead and prove what private and confidential information of the hardware and software of the Airside GSE Simulator that they are each alleged to have communicated to the first defendant.

[32] In these circumstances, I find that the plaintiff had failed to establish or prove its claim for breach of confidence against either the second defendant or the third defendant, and therefore dismiss this claim against both of them.

THE PLAINTIFF'S CLAIM FOR AGAINST THE SECOND AND THIRD DEFENDANTS FOR CONSPIRACY TO INJURE THE PLAINTIFF

Some basic principles

[33] In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, the Court of Appeal set out the four ingredients for proving the tort of conspiracy to injure. They are:

(a) an agreement between two or more persons;

(b) the agreement is for the purpose of injuring another;

(c) acts done in execution of that agreement resulted in damage to the other; and

(d) damage resulted.

[34] In respect of an agreement between two or more persons, in *Renault SA*, KN Segara JCA said (in para 33 of the judgment):

> It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement, is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators'. After that, it has to be shown

or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar wiil have to make for the Kangoo project.

[35] In *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187, Wong Kian Kheong JC (now JCA) held, inter alia, that such an agreement or combination may be and may be in writing or by word of mouth.

ANALYSIS AND DECISION

[36] The plaintiff's pleaded particulars of its claim for conspiracy to injure against all three defendants are in para 49 of its *pernyataan tuntutan*, and can be summarised as follows:

(a) the second and third defendants both resigned from the plaintiffs employ in January 2021 and had both worked on the development of the Airside GSE Simulator whilst in the plaintiffs employ;

(b) the first defendant launched its own Airside GSE Simulator the following month;

(c) the first defendant had advertised and marketed the Airside GSE Simulator as its own;

(d) the first defendant had also approached other plaintiff's employees enticing them to leave the plaintiffs employ and join the first defendant;

(e) the first defendant was still able to access the demonstration set even though the plaintiff had locked it remotely; and

(f) the first defendant was able to develop its own Airside GSE Simulator after the second and third defendants joined it.

[37] In my view, these particulars are insufficient and fall way short of what the law requires the plaintiff to plead. In this instance, the plaintiff failed altogether to plead any agreement between the defendants that they had purportedly entered into for the purpose of injuring the plaintiff, let alone any particulars. The plaintiff also failed to plead the specific acts that they had done in execution of that alleged agreement. Having had access to the plaintiffs confidential information, joining the first defendant, being seen entering the first defendant's premises and being photographed operating the demonstration set, even taken collectively, do not a conspiracy to injure make.

[38] In my view, the plaintiff is again expecting this court to assume, just because the second and third defendants were previously employed by the plaintiff, had access to the plaintiffs confidential information on the Airside GSE Simulator, then joined the first defendant who developed its own Airside GSE Simulator, that there was a conspiracy between them to injure the plaintiff.

[39] In my view, if any, it was the first defendant who was the cause of the plaintiffs woes and grievances, and the plaintiff was sore that the second and third defendants had joined the first defendant after the disdain in which the first defendant had dealt with the plaintiff. However, as the plaintiff had already recorded the consent judgment with the first defendant, that is the bargain that it has reached with the first defendant. But that bargain does not weigh in or make the second and third defendants liable to the plaintiff for any of its claims against them.

[40] In the circumstances, I also find that the plaintiff had failed to establish or prove its claim for conspiracy to injure as against the second or third defendant.

CONCLUSION

[41] On the plaintiff's pleaded case and on the evidence, I find that the plaintiff has failed to establish or prove its claims of either breach of confidence/confidentiality or conspiracy to injure as against the second and third defendants.

[42] I accordingly dismiss this action as against the second and third defendants.

[43] For costs, in their written submissions and Reply written submission the second and third defendants had consistently asked for costs of RM15,000 each. In my opinion, that sum is paltry compared to the fact that this was a trial in the High Court over several days, with the court having to peruse a multitude of documents and take the evidence of several witnesses, and conclude that the plaintiff had simply not adequately or sufficiently pleaded its case.

[44] I will, however, assume that, despite being sued by their former employer, the second and third defendants are simply being magnanimous in asking for that sum. Who knows that the future holds.

[45] Acceding to their wishes, in dismissing its claim, I therefore order the plaintiff to pay costs of RM15,000 to each of the second and third defendants.

Plaintiff's claims against D2 and D3 dismissed.

Reported by Ashok Kumar